Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

COMMENTS OF BRIGHT HOUSE NETWORKS

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TABLE OF CONTENTS

Page

SUMMARY

Pole attachment disputes, both regarding access and rates, have long been part of the regulatory underbrush that have stymied innovation and competition from communications providers. Many of the FCC's proposals in this proceeding at long last would provide a clearing in the path.

Bright House Networks applauds the effort to establish ground rules and, fully consistent with Congress's statutory guidance, provide a more easily administrated rate scheme that provides like rates for like attachments. The Commission's proposal toward a unitary rate promotes the vital goals of the National Broadband plan and is faithful to the plain text and structure of the governing statute. It harmonizes the pole attachment rate scheme with the bedrock economic principle of cost causation. It recognizes that the addition of innovative services that place no new physical stress or burden on utility poles and therefore engender no new costs to the pole owner should, where permitted by the rules, trigger no additional pole rents. It makes unnecessary the difficult task of determining what services are being used by a customer over a particular attachment, where the chosen service imposes absolutely no different burden on the pole owner's property. The proposal's explicit recognition of make-ready as the appropriate vehicle for attributing costs to attachers rounds out the Commission's sensible approach here.

The Commission's proposal also fully comports with the constitutional rights of pole owners to avoid takings under the pole rate statute. Importantly, the rate changes proposed by the Commission will spur competition to serve anchor tenants and other community-based institutions with innovative service offerings. Customers in that

market have had a choice of providers limited to incumbent telcos, whose pole rates were protected by joint use agreements. Bright House Networks now provide those key community institutions with choice as to price and services. Reasonable pole rates can make the difference between a viable and nonviable competitive offer.

We urge the FCC to reaffirm an additional point in this comprehensive reform package, namely that the longstanding and constitutional rate scheme adopted for cable attachments also applies to commingled services, where the FCC has yet to classify the service involved. The need is urgent, given the willingness of utilities to litigate virtually any conceivable ambiguity involved in pole attachments. Restating this decades-old principle will avoid further rate attachment disputes based on the regulatory classification of an offering which does not fit the definition of a telecommunications service but which provides a competitive alternative in the market.

We also believe that the FCC should not adopt more severe penalties for unauthorized attachments. In Bright House's experience, utility claims of unauthorized attachments are wildly inaccurate, owing to deeply flawed audits that are even not designed to identify attachments made without permits in the first place. Thus, enhanced penalties are not necessary to ensure compliance with permitting procedures. Where there are issues of legitimate unauthorized attachments, the Commission's current dispute process and penalties amply protects the rights of both attachers and pole owners.

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Bright House Networks ("Bright House"), by its counsel, hereby submits its comments regarding the FCC's Further Notice of Proposed Rulemaking *("FNPRM")* released May 20, 2010, in the above-captioned matter regarding changes to the pole attachment rules.

I. INTRODUCTION AND BACKGROUND

Bright House, the nation's seventh largest cable multiple system operator, is a full service communications provider in Florida, Alabama, California, Indiana, and Michigan, serving approximately 2.4 million customers. In 2009, for the fourth year in a row, Bright House was rated highest in customer satisfaction by J.D. Power and Associates among providers of voice services in the South. Also in 2009, for the second year in a row, J.D. Power and Associates announced that Bright House ranked highest in customer satisfaction in the South region according to the 2009 Internet Service Provider Residential Customer Satisfaction Study.

In each of its systems, Bright House offers advanced digital video, high-speed data, and facilities-based competitive voice service. Bright House wiring is attached to

more than one million poles across its service areas and pays annual pole rent in excess of $11 million dollars.

Bright House has filed comments in earlier phases of this proceeding and submitted comments and other information to the FCC's Broadband Task Force regarding the deterrent effect of higher pole attachment rates on offering new, advanced services to anchor institutions like school districts. In particular, Bright House has pointed out that it is important to maintain the lowest compensatory rate possible for attachments that commingle cable service with these new services, services that are often not classified as telecommunications service. These different services provided by an attacher present absolutely no additional burdens on the property of the pole owner. Cost causation principles instruct that no higher rates be imposed because of the different services being provided over the same wire.

The possibility that such commingled services will be subjected to a higher telecommunications services rate ("telecom rate"), or no regulated rate at all, can frustrate Bright House's competitive entry[1]. Meanwhile, incumbent communications providers, often operating under joint use agreements with utilities, enjoy the benefits of forestalled competitive broadband entry. Worse, customers are denied a competitive choice in providers offering an array of broadband-enabled, innovative communications services. The need for reform is urgent. Bright House has been required to bear the costs of extensive litigation spanning four years, culminating in a two-week trial in 2010

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[1] *See* Letter to Marlene Dortch, Secretary, FCC, from Counsel, Bright House Networks, Affidavit of Mr. Nick Lenoci, Bright House Networks, filed in GN Docket Nos. 09-47, 09-51, 09-137 (Feb. 16, 2010), cited in Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan at 116 (2010), discussing how application of higher pole attachment rate would increase the expense of providing Fast Ethernet connections to a large high school district by $220,000 annually.

over the characterization of its attachments on Tampa Electric Co.'s (TECO's) utility poles.

Bright House welcomes many of the *FNPRM*'s recommendations, particularly as to the proposed changes to the pole rental rates. *In addition*, we urge the FCC to reaffirm that the cable service rate applies to all services commingled with cable service, where those commingled services are unclassified. This recommendation is entirely consistent with the *FNPRM*'s goals of establishing a fully compensable rate that encourages, not deters, broadband expansion. And it would make sure that pole owners do not use a service's "unclassified" status to attempt to impose a rate other than the cable service rate.

II. THE FCC SHOULD REITERATE ITS FINDING IN *GULF POWER* THAT ATTACHMENTS CARRYING UNCLASSIFIED SERVICES COMMINGLED WITH CABLE SERVICE SHOULD RECEIVE THE CABLE SERVICE RATE.

Bright House enthusiastically supports the *FNPRM*'s proposed revised interpretation of the telecommunications service rate. Reinterpreting the telecom rate will help to bring certainty to the pole attachment rate regime, thereby reducing time-consuming and costly disputes over the applicable rate and help to foster deployment of innovative services. In doing so, however, the Commission should recognize that there remain services that are not "telecommunications services" that are commingled with cable service facilities. The Commission should reaffirm that attachments that carry these services also should be afforded the cable service attachment rate -- the approach adopted in *Gulf Power*.

A. Innovative Communications Services, Which Do Not Fit the "Telecommunications Service" Category, Can and Should Be

Promoted by Applying the Commingled Services Rate Approach of *Gulf Power*[2].

Bright House urges the FCC to reaffirm its earlier determinations about the attachment rate applicable to services commingled with cable services. As explained below, the same policies that justify the cable rate service as the appropriate rate for telecommunications services (when that rate exceeds the lower-bound telecommunications service rate) also support, indeed, compel, the result reached in the *Gulf Power* case that commingled services should be assigned the cable services rate under the FCC's Section 224(b) discretionary authority to adopt just and reasonable pole attachment rates.

Companies like Bright House are providing formidable competition to entrenched communications service providers by offering new and innovative services to commercial customers. These communications services are, in many places, commingled with Bright House's traditional video service. These services often do not, or have not been deemed to, fit the statutory definition of "telecommunications service" and consequently may be best described as unclassified services. VoIP is surely the most prominent of these unclassified services.

But there are others, which constitute an increasingly important competitive alternative to services traditionally provided by incumbent carriers. For instance, Bright House provides dedicated bandwidth through Metro Ethernet service to commercial and other nonresidential users. This service, often used to support local area networks

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[2] Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) ("*1998 Order*"), *aff'd in part, rev'd in part*, Gulf Power v. FCC, 208 F.3d 1263 (11th Cir. 2000), *rev'd sub nom.* National Cable & Telecommunications Ass'n v. Gulf Power, 534 U.S. 327 (2002) ("*Gulf Power*").

(LANs) and wide area networks (WANs), though not offered as a telecommunications service, provides a competitive spur to telco incumbents. Similarly, cable providers like Bright House have entered other fiber-based data point-to-point businesses, including cellular backhaul, an important service in the context of FCC review of special access services offered by the incumbents. And cable is at the beginning of providing services to facilitate smart grid applications. California, one state in which Bright House operates, is actively encouraging utilities to consider existing networks, such as cable, when implementing the communications component of the smart grid platform[3].

These and other innovative private-carriage communications services -- to be designed by networks like Bright House or created in response to requests for proposals or business initiatives from would-be customers – do not qualify as "telecommunications service" under the Communications Act. But they can be offered on cable plant, often using dedicated bandwidth, commingled with cable's original and still primary offering, cable service.

These services follow a tradition of innovation of nonvideo services on cable plant spanning decades . And this innovation occurs on the same pole attachment, with no additional stress or burden on the pole owner's property. The *FNPRM* emphasizes cost causation in describing its rate approach.[4] Introducing new services on a wire does not incur a cost for the pole owner. Therefore, sound economics would not

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[3] *See* Order Instituting Rulemaking to Consider Smart Grid Technologies Pursuant to Federal Legislation and on the Commission's Own Motion to Actively Guide Policy in California's Development of a Smart Grid System Proceeding R08-12-009 (filed December 18, 2008).

[4] "Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer, the cost causer, pays a rate that covers this cost." *FNPRM* at ¶ 134.

impose a new charge on the attacher. Nor should the FCC's pole rate rules, so long as the statute permits the agency to pursue sound economic principle, which it does.

Significant to this context, the FCC has repeatedly viewed these innovative types of commingled services, whether offered through existing wire attachments or overlashed wires, as entitled to attachment, and entitled to attachment at the cable service rate.

In its *1998 Order* first implementing the regulations to govern the charges for pole attachments used by carriers to provide telecommunications services, the FCC also addressed whether cable operators were entitled to the benefits of the pole attachment law when providing commingled Internet and traditional cable services.[5] It determined that cable operators were protected by the Act's requirement that pole rates, terms, and conditions are just and reasonable. Even more significant, this proceeding addressed the question of what pole rate applies when a cable operator offers an unclassified service commingled on the same attachment as a cable service. The Commission determined that a cable attachment carrying cable service commingled with an unclassified service (in this case cable modem service, which had not yet been classified) was entitled to the cable service rate.

In so concluding, the FCC relied on its earlier 1991 *Heritage* decision.[6] In that decision the cable operator provided traditional cable services as well as nontraditional services. Those combined offerings were precursors of the innovative services Bright

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[5] *See Gulf Power*, 534 U.S. at 333-39.

[6] Heritage Cablevision Associates of Dallas, L.P. v. Texas Utils. Elec. Co., 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom.* Texas Utils. Elec. Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993).

House provides for nonresidential customers today: The *Heritage* services included "nonvideo broadband communications services, including data transmission services pursuant to private contract to commercial customers in the Dallas metropolitan area."[7] In particular, the cable operator provided a point-to-point fiber route running north and south through Dallas connecting the downtown editorial offices of *The Dallas Morning News* with the paper's Plano printing plant. The operator also used the pole-mounted fiber to connect communications between two long distance carriers, and between two University of Texas buildings.[8]

In *Heritage,* the Commission concluded that the utility pole owner could not charge a separate fee for the nontraditional services at issue. It held that the pole owner must charge a single rate for the attachments using the cable rate formula. And it ordered a refund for any amounts paid in excess of the cable pole attachment rate.[9] In policy terms reminiscent of the conclusions of the National Broadband Plan, the FCC in *Heritage* concluded that its action "enhances cable operators' ability to compete against utility companies in the provision of data services."

The Commission also referenced earlier findings that cable service represents the initial practical application of *broadband* cable technology. It found that "there is a substantial expectation that *broadband* cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services

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[7] *Id.* at 7100.

[8] The operator also provided institutional network services as required by its franchise for schools and government administrative offices. *Id.* n.8.

[9] *Id.* at 7106.

involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds." [10]

In its *1998 Order,* the Commission flatly rejected the utilities claim that the 1996 Act overturned *Heritage*:

> We disagree with the utility pole owners who assert that the *Heritage* decision has been 'overruled' by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video.[11]

The teaching of *Heritage* and the *1998 Order* could not be clearer on the FCC's longstanding determination to provide a unitary rate to unclassified services that are commingled with cable service. The types of services offered by the cable system in *Heritage* are the much the same kinds of services offered by Bright House today. Unless a service is explicitly offered by a cable operator as a telecommunications service, the FCC's consistent practice has been to treat such commingled attachments as subject to the cable service rate, a practice that the Supreme Court found well within the agency's authority to do[12]. The FCC should reaffirm this approach.

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[10] *Id.*, at 7102 n.28, *citing* Section 214 Certificates (Final Report and Order), 21 FCC 2d 307 (1970) (emphasis added by FCC citation). *Cf.* Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan at 109 (2010): "Applying different rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions. This is especially true with regard to integrated voice, video and data networks."

[11] 13 FCC Rcd at 6793.

[12] As the Court explained in *Gulf Power*, "Congress may well have thought it prudent to provide set formulas for telecommunications service and 'solely cable service,' and to leave unmodified the FCC's customary discretion in calculating a 'just and reasonable' rate for commingled services" because such services "might be expected to evolve in directions Congress knew it could not anticipate." 534 U.S. at 339.

The need to reaffirm this practice is urgent. Utilities have incentive to, and do, litigate the rate charged when unclassified services are commingled with cable service. The burden on cable operators, and Bright House in particular, is considerable.

Bright House has been enmeshed in one such massive dispute, now its fourth year. In 2006, TECO filed a state court complaint against Bright House in Tampa, alleging liability for years' worth of back pole rental at the telecom service rate for all of its pole attachments because they are used to provide Bright House customers with VoIP Digital Phone service.[13] In response Bright House had to initiate a pole attachment complaint proceeding at this agency, seeking relief from TECO's effort to impose the telecom service rate as unjust and unreasonable.[14] A two-week trial occurred earlier this year with the case under submission to the trial court judge.

The FCC should reaffirm its view that commingled attachments that include unclassified services are subject to the cable service rate. The FCC will thereby erect a "STOP" sign to the flow of litigation[15], exemplified in the TECO case, by utilities seeking rulings in state court proceedings that depart from settled FCC commingled services precedent.

B. The Commission's Overlashing Decisions Support This Approach.

This approach – applying the cable rate to commingled unclassified services -- is also consistent with the FCC's policies supporting overlashing for innovative services. As the Commission noted in its *1998 Order*, "We think overlashing is an important

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[13] Tampa Electric Co. v. Bright House Networks, LLC, No. 06-00819, Complaint (filed Jan. 30, 2006).

[14] Bright House Networks, LLC v. Tampa Electric Co., Pole Attachment Complaint (filed Feb. 21, 2006).

[15] And *see* Comments of Ameren Servs. Co. & Virginia Elec. & Power Co., WC Docket 07-245 at 17 detailing pending rate disputes relating to commingled attachments used to provide VoIP service.

element in promoting the policies of Sections 224 and 257 to provide diversity of services over existing facilities . . . and increasing opportunities for competition in the marketplace."[16] In order to further the deployment of services provided by overlashing, the Commission rejected pole owner arguments that overlashing one's own pole attachment is not permitted without preapproval. Instead, the Commission concluded that no preapproval was required. And no additional charge to the pole rate can be made, so long as no additional burden is placed on the pole.

The FCC did require attachers who added telecommunications service to the attachment by overlashing to notify the pole owner and to pay the telecommunications rate. But the FCC concluded that other services that might be added by overlashing by the cable operator require no preapproval from the pole owner, and this view was affirmed on reconsideration.[17] The goal of these decisions is consistent with what Bright House urges here: the addition of unclassified innovative services by overlashed plant (or otherwise) to a cable attachment occasions no change to the rate paid by the cable attacher. And it shows that even when a services is not commingled, the underlying cable rate continues to be the prevailing rate.

C. The FCC's Application of the Cable Service Rate to All Unclassified Services Commingled with Cable Service Is Consistent With the Commission's Pole Attachment Regime.

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[16] *1998 Order*, 13 FCC Rcd at 6807 ¶ 62 (footnote calls omitted).

[17] "We affirm our policy that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment." Amendment of Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 ¶ 75 (2001) (footnote calls omitted).

While the *FNPRM* correctly focuses on revising the telecommunications service rate, Bright House urges the FCC to reiterate its longstanding policy toward the regulatory treatment of unclassified services commingled with cable service: namely, that such an attachment is subject to the cable service rate. The sound policy reasons that led the Commission in *Heritage* and *Gulf Power* to apply the cable rate to the commingled attachment continue to apply to today's innovative services. By re-confirming the unitary, cable rate, the FCC promotes innovative and competitive communications offerings without triggering complicated disputes about regulatory classifications.

It is certainly true that if the applicable "telecommunications service" rate is likely to be the same as the cable rate under the *FNPRM*, then a cable attacher will pay a unitary rate if it concedes that the unclassified service is a "telecommunications service." But that concession would force an attacher to define an unclassified service as a "telecommunications service" in advance of any such classification determination by this Commission. As such, the concession would disrupt this agency's oversight and responsibility to classify communications service and it could also import an unwelcome and unnecessary regulatory overlay onto the service that goes well beyond determining the pole attachment rate.[18]

Such classification may thus trigger regulatory consequences, state and federal, that are inappropriate for that service and that would otherwise conflict with how the

[18] For example, VoIP has not been classified. The FCC has created a series of regulations under Title I authority addressing various responsibilities of VoIP without having to classify it as a telecommunications service, a decision which would create possibly unintended regulatory requirements.

FCC would treat the service[19]. The unintended consequence of additional regulation for innovative services may also inhibit broadband deployment. Yet a cable attacher facing a drag-out fight with the pole owner unless it concedes a (possibly erroneous) regulatory classification may have no choice. As the FCC has already addressed this situation in the *Gulf Power* case, it will be most helpful as part of a comprehensive pole attachment decision to restate it in the decision in this docket as well.

III. THE FCC SHOULD ADOPT THE *FNPRM*'S REVISED TELECOMMUNICATIONS SERVICE RATE

A. The Proposal Is Consistent With Congress's Direction on Calculating Pole Rates and Gives Full Meaning to All Parts of Section 224

The Commission's *FNPRM* proposes that to determine the "just and reasonable" telecom rate that utilities may charge, a utility "would calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher."[20] This formulation will ordinarily result in the cable rate being the default higher rates as between the two.[21]

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[19] As the Commission has recognized, classification as a telecommunications carrier carries significant regulatory consequences under state and federal law. *See* Bright House Networks, 23 F.C.C.R. 10704 ¶ 39 (2008) ("being deemed a 'common carrier' (i.e., being deemed to be providing 'telecommunications services') confers substantial responsibilities as well as privileges, and we do not believe these entities would [choose to hold themselves out as common carriers] lightly."). In Florida where Bright House operates, for example, a competitive telecommunications provider must obtain a certificate of convenience and necessity from the Florida PSC. *See* FLA. ADMIN. CODE § 25-24.805. The provider must also file pricing information with the PSC, *see id.* § 25.24-825 (1), provide information about its end-users to any telecommunications company that requests it, s*ee id.* § 25.24-825 (5), and pay a regulatory assessment fee to the PSC, s*ee id.* § 25-4.0161; *id.* § 25-24.835. A provider can be subjected to severe penalties for failure to pay such fees. *See id.* § 25-4.0161; *id.* § 25-24.835.

[20] *FNPRM at* ¶ 141.

[21] *Id.* at n.378 ("[I]t appears that the current application of the telecom rate formula yields the highest pole attachment rate, the lower bound application of the telecom rate formula yields the lowest rate, and the current application of the cable rate formula yields a rate in between these upper and lower rates.")

As the *FNPRM* avers, this rate approach furthers the goals of the Communications Act. It promotes competitive parity among providers. Cable's provision of VoIP service or other unclassified commingled service, which attaches at the cable rate, will be the same as, say a CLEC's telecommunications service attachment. As parties earlier have noted, like services should be subject to like rates.[22] The rate determination for the cable rate and the lower bound telecom rate is readily administrable because it relies on publicly filed FERC 1 data that has been part of pole attachment rate setting for decades. By providing a unitary rate in most if not all cases (because the cable rate will be the prevailing rate), the Commission will minimize disputes over rates caused by differentiated treatment of similar services under the pole rate formulas. The proposal results in the policy benefits observed by the *FNPRM*.

1. The Proposal Fully Accounts For All Elements Of Section 224(e) Addressing Telecommunications Service Rates.

Setting the telecom rate at the higher of the cable service rate or the lower telecom service rate gives full effect to all elements of Section 224(e). This is because, as the *FNPRM* points out, while Section 224(d)(1) refers to "capital costs" in establishing the boundaries of "just and reasonable" rates, the articulation of the appointment rules for telecom service rates in Sections 224(e)(2) and 224(e)(3) only uses the words "costs". Principles of statutory interpretation obligate agencies to give effect to each word used by Congress. Where as here, Congress has used different formulations in different sections, the Commission is well within its discretion to interpret,

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[22] *Id.* at n.381, citing comments of TWTC *et al.*, Comments at 8-9; Knology Comments at 5, Bright House Reply Comments at 9-12.

as the *FNPRM* does, the term "costs" differently in establishing the lower bound if it has a reasonable basis to do so.

The *FNPRM*'s reasons for excluding capital costs for purposes of identifying the lower bound for the telecom pole rental rate are ample in this regard. As noted *supra*, there are no new costs borne by the pole owner when additional services are provided over an existing attachment. So no adjustment to the pole rent makes sense.

This sensible view was, and is, accepted as a matter of course when cable operators add new cable services. The expansion of cable from a limited-channel analog offering to an analog/digital platform comprising hundreds of channels and with on-demand functionality – none of those additional services imposed any new burden on pole owners and should not, under the principle of cost causation, lead to any changes in pole rents.

Where new costs are triggered, as sometimes happens with a new attacher, as the *FNPRM* indicates, nearly all capital costs are paid for through the make-ready process. Attachers already must currently bear the entire amount of those costs. Second, there is correspondingly no evidence that an attacher is a significant cost causer of past investments in an existing pole. Utilities invest capital into poles for the benefit of the utility's customers, not for possible future attachers. Indeed, it would be passing strange for a utility to insist that it routinely seeks recovery of capital costs in its rate-setting process with state commissions to be reimbursed to meet the future needs of unaffiliated and unidentified attachers.

If space on the pole exists for an attacher after the pole is constructed, the pole attachment regime governs how much a subsequent unaffiliated attacher will pay and

how it may attach. But its presence on the pole did not cause the capital outlay for that pole.[23] Therefore the Commission is right to interpret Section 224(e)'s use of "costs" to include operating expenses (including maintenance and administrative expenses) for the lower bound telecom rate formula but exclude capital costs, including taxes.

By excluding capital costs, the proposed revision to the Section 224(e) methodology reduces the "carrying charge rate", a multiplier in the computation of the two elements (usable and unusable space) of the telecom rate formula. That formula determines how much the pole owner may collect from a telecom service attacher for maintaining the pole and administering poles. It modifies, but does not eliminate, the requirements for apportioning costs set forth in Sections 224(e)(2) and (e)(3) and formulated explicitly in the *1998 Order*[24].

The carrying charge rate is larger when it includes a return on invested capital . By eliminating that portion of the carrying charge rate, the result is a smaller multiplier at the end of each computation. The FCC still is allowing a pole owner to recover administrative and maintenance costs associated with the attacher's presence on the pole. But no return on its investment based on the attacher's presence (except for

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[23] *FNPRM* at ¶ 135: ("As a result, under a cost causation theory, were there is space available on a pole, an attacher would be required to pay for none, or at most a de minimis portion of the capital costs of that pole.")

[24] Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777, 6822-23 ¶¶ 99-102 (1998). These two parts are:

Telecommunications service rate = Unusable Space Factor [224(e)(2)] + Usable Space Factor [224(e)(3)].

These translate into the following formulas for computation:

Unusable Space Factor = 2/3 X [Unusable Space/Pole Height] X [net cost of bare pole/# of Attachers] X **[Carrying Charge Rate]**

Usable Space factor = [Space occupied by Attachment/Total usable Space] x [total usable space/Pole Height] X [net cost of Bare Pole] x **[Carrying Charge Rate]**

make ready, paid for by the attacher).[25] But the *FNPRM* proposal allows the pole owner to collect under *both* elements of Section 224(e)(2) and (3) , giving full effect to the entire provision.

Recognizing that the operation of the formula with *no* capital costs included will often result in an attachment rate below the cable service rate, the FNPRM's proposal allows the pole owner alternatively to collect the cable service rate. Despite this backstop, the proposal, as noted, requires a calculation under 224(e), the telecommunications service rate sections. An agency must give meaning to every part of a statute; with its *FNPRM* proposal, the FCC has.

Not only does the proposed approach effectuate all parts of Section 224(e) in its calculation; it is also consistent with the legislative history of the amendments to Section 224 in the 1996 Act. The House version of the changes to the pole attachment provisions would have instructed the FCC to regulate telecommunications service attachment rates based on a "fully allocated cost" formula to result in a higher unusable space component to the Section 224(e) formula. While the legislation does not dictate how the word "costs" should be applied in the carrying charge factor, the House Senate Conference did not adopt the House's formulation. The Senate version contained no

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The effect of the FNPRM is to reduce the bold multiplier.

[25] Moreover, as the legislative history of the 1996 amendments to Section 224 shows, the Conference agreement did not adopt the House's version of the telecom service rate formula. The House's approach directed the Commission to require that a cable company providing telecommunications service "pay the pole attachment rate ... pursuant to the full allocated cost model." The Conference report did not adopt that instruction. Conference Report No. 104-458, 104th Cong., 2d Sess. pp. 206 (1996).

such provision. The conference agreement adopted the Senate provision with modifications, not the House approach.[26]

2. The Proposal Is Consistent With Section 224(b), which Applies to, And Must be Applied to, All Commission Pole Attachment Rates

The *FNPRM*'s proposal also is consistent with the overall way in which Section 224 is to be read. It produces a faithful implementation of Congress's 1996 amendments to the section. Indeed, it may produce a rate-setting regime even *more* consistent with the statute than the current administration of Section 224(e).

Section 224(b) provides that all pole attachment rates must be "just and reasonable."[27] It therefore governs *all* rates established under Section 224: (i) attachments used by a cable television system solely to provide cable service, (ii) attachments used to provide telecom service, and (iii) attachments that fit neither category but whose rates may be established by the Commission, such as the rate for commingled services established and upheld in the *Gulf Power* case.

The critical term "just and reasonable", however, is not defined within subsection (b). Instead, that term, "[f]or purposes of subsection (b) of this section," is defined in Section 224(d)(1). Subsection (d)(1) says that a "just and reasonable" rate is one that

> assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole

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[26] Conference Report No. 104-458, 104th Cong., 2d Sess. pp. 205-07 (1996). "The conference agreement adopts the Senate provision with modifications." *Id.* at 207.

[27] 47 U.S.C. § 224(b)(1).

attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.[28]

By the plain language of the statute, Sections 224(b) and Section 224(d)(1) must be read together[29]. And together they define, statute-wide, an upper limit for just and reasonable rates. This upper bound rate applies not just for cable services but for all rates regulated under Section 224. As the Supreme Court explained in *Gulf Power*, the rate formula in subsection (e) is a "subset[] of – but not limitation[] upon" the requirement of "just and reasonable" for all pole attachments mandated by subsections (a) and (b).[30] And in amending the statute in 1996, Congress did not exempt Section 224(e) from the application of (b) and, therefore (d)(1). To the contrary, Section 224(e)(1) repeats the requirement of subsection (b) by mandating that implementation of Section 224(e)(1) produce pole rates that are "just, reasonable, and nondiscriminatory[31]."

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[28] *Id.*, § 224(d)(1).

[29] It might seem logical to have placed (d)(1) within the confines of (b) inasmuch as (d)(1) defines the term "just and reasonable" that appears there. One explanation for the separation is that prior to 1996, Section 224 solely addressed attachments by a cable television system, *id.*, § 224(a)(4), and the rate approach was the one specified for such attachments. There would have been no confusion as to whether (d)(1) applied to all pole attachments covered by Section 224 and 224(b) in particular, prior to 1996. When subsections (d)(3) and (e) were added in 1996, neither (b) nor (d)(1) was modified to apply only to cable-service-only attachments or to exclude telecommunications service attachments from their effect.

The first sentence of Section 224(d)(3) does not indicate that (d)(1) is exclusively concerned with cable service attachments. This sentence states, "This subsection shall apply to the rate for any pole attachment used by a cable television system "solely" to provide cable service." This sentence directs the FCC to consider (d)(1) only, *if* the system *solely* provides cable service. If the system also provides telecommunications service, then the post apportionment rules of (e) must apply, but that does not negate the applicability of (d)(1). And if the attacher provides some other commingled service, the FCC has discretion to determine the "just and reasonable" rate, as it did in *Gulf Power*.

[30] 534 U.S. at 336.

[31] 47 U.S.C. § 224(e)(1). There is no legislative history explaining what "nondiscriminatory" means in this subsection. But from the wording of the section, it is clear that the requirement of nondiscrimination is not limited only to and among telecom pole rates but to all "rates for pole attachments." The *FNPRM*'s proposed telecom rate, which would lead to a generally unitary rate – the cable rate – for all attachers, cable and telecom alike, is consistent with this requirement to ensure "nondiscriminatory rates." Indeed it

Thus, using the Section 224(d)(1) rate to determine the permissible telecom service rate (if it is higher than the low end produced by the telecom service rate formula) is entirely consistent with the overarching Congressional requirement that all rates produced by the FCC's procedures comply with Section 224(b). That it also is the cable service rate and not some higher number does not alter its fidelity with Section 224(b) or any other subpart of Section 224[32]. Thus, in addition to independently promoting the policy goals of lower broadband cost inputs, the *FNPRM's* approach harmonizes the subsections of Section 224, adopted at different points in the Communications Act's history. Consistent with the traditional rules of statutory

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is more consistent with "nondiscriminatory" as used in public utility regulatory context than the current rate scheme that prices attachments based on something other than cost causation.

[32] Section 224(e)(4) does not conflict with the unambiguous language of (b) and (d)(1) and their application to the telecom rate. Section224(e)(4) states that "[a]ny "*increase* in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments" over five years. *Id.*, §224(e)(4) (emphasis added). This provision does not mean that telecom rate formula under the 1996 Act amendments had to exceed the maximum permitted cable rate. It requires only that *if* the telecom rate formula leads to increases in pole rates, such increases must phase in over five years.

Several points support this reading, apart from the words of the statute themselves. First, as the *FNPRM* notes, the 1998 implementation recognized that the telecom rate established there could be *lower* than the rate yielded by the cable rate formula. *FNPRM* at n.378. *See* 47 C.F.R. § 1.1409(f). So increases are not inevitable.

Second, nothing in the 1996 amendments prevented the FCC from readjusting cable rate formula downward before or when it established the telecom formula in 1998. (Recall, the FCC was given ample time -- two years -- before telecom pole rate rules had to be established, 47 U.S.C. §224(e)(1), and five years to implement them.) The cable rate formula had been established in the 1987 Rate Rules at the maximum rate permitted by (d)(1), Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). The cable rate could have been (and can be today) reset at some number less than the current rate but above the lower bound of "additional costs of providing pole attachments". Indeed, the Senate Report accompanying the 1978 amendments, *infra* note 37, thought the cable rate should be set "somewhere between" the two limits in Section 224(d)(1); and that section explicitly gives the FCC this authority to set a rate within these bounds. (And, as noted *infra*, Congress anticipated that the FCC might consider other cable rate formulations, as expressed in the 1978 law's original 224(e), repealed in 1982.) Had the cable rate been adjusted, then, the telecom rate would have been higher than a reset cable rate by several increments but still have been bounded by the upper bound of Section 224(d)(1). Section 224(e)(4) requires no more.

construction[33], the FNPRM proposal's adoption would in fact make the latter adopted Section 224(e) more consistent with the earlier enacted Section 224(b) than the current interpretation of the telecom service rate.

The legislative history of Section 224 reflects the centrality of Section 224(b) and its explication in 224(d)(1) to Congress's goals for pole rate regulation. Section 224 was originally incorporated into the Communications Act as part of a series of amendments in 1978. In providing for a federal formula for pole attachments, Congress recognized that the capital costs of poles were already incurred by utilities regardless of the existence of other attachers. Rent from additional attachers was viewed in 1978 as found money for pole owners.

> It has been made clear ... that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant.[34]

The history provides support for the view that "just and reasonable" rates are to be guided by Section 224(b) as modified by Section 224(d). As the 1978 legislative history explains, Section 224(d)'s rate setting formula was adopted, in part, "to provide the Commission with a sense of congressional intent as to the meaning of the term 'just and reasonable."[35]

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[33] *See, .e.g.,,* James Madison Ltd. By Hecht v. Ludwig, 82 F.3d 1085, 1093 (D.C. Cir. 1996) (obligation "to interpret the statute's provisions in harmony with each other").

[34] Sen. Rep. 95-580, Communications Act Amendments of 1978, P.L. 95-234, 92 Stat. 33, 97th Cong., 2d Sess., 1997 U.S.C.AA.N. 109, 124.

[35] *Id.*, at 129.

The rate approach taken in Section 224(d) was initially intended to provide an interim cable service rate formula for five years[36] while the FCC considered that formulation of a rate approach among others. At the end of the five years, the 1978 history anticipated, the "Commission shall be guided by the 'just and reasonable' standard set forth in subsection (b) of this section," adopting whatever specific rate-setting approach it finally chose.[37]

However, the FCC settled on the interim approach as its permanent approach, and the five-year limitation was deleted from the law[38]. Section 224(d) thus was kept intact, amended by the 1996 Act's changes to Section 224(e). The upshot: Section 224(b) continues to govern rate-setting by the FCC under *all* of its sections and Section 224(d)(1) continues to provide the FCC with its rate-setting touchstone for all rates to assure that they are "just and reasonable."[39]

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[36] P.L. 95-234, 92 Stat. 33, 97th Cong., 2d Sess.: "(e) Upon the expiration of the 5-year period that begins on the date of enactment of this Act the provisions of subsection (d) of this section shall cease to have any effect." (repealed).

[37] Sen. Rep. 95-580, Communications Act Amendments of 1978, P.L. 95-234, 92 Stat. 33, 97th Cong., 2d Sess., 1997 U.S.C.AA.N. 109, 135. Despite describing the rate-setting formula as interim, the Senate Report accompanying the legislation gives a detailed justification for its approach, concluding that" [t]his interim formula reflects a belief that the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television and to insure that cable operators and their subscribers make some equitable contribution to the fixed costs of the utility systems they use." Id. at 127. Under the FCC's proposed approach the Commission will avoid inhibiting the growth of broadband offered by cable operators.

[38] Communications Act Amendments of 1982, P.L. 97-259, 96 Stat. 1087: SEC. 106. "Section 224 of the Communications Act of 1934 (47 U.S.C.224) is amended by striking out subsection (e) thereof."

[39] The Commission's use of the cable service rate for telecommunications service attachments has precedent in the Act itself. Section 224(d)(3) of the 1996 Act applied the cable service rate to telecom attachments for several years, specifically "[u]ntil the effective date of the regulations required under subsection (e)." 47 U.S.C. § 224(d)(3). The FCC adopted the rules in 1998 and they were effective February 8, 2001. 13 FCC Rcd. at 6834 ¶ 125: "Because the 1996 Act was enacted on February 8, 1996, Section 224(e)(4) requires the Commission to implement the telecommunications carrier rate methodology beginning February 8, 2001." As a matter of fact, then, the FCC continued to apply the cable service rate until the telecom service rate was effective. Pole owners were entitled to whatever adjustments occurred thereafter. But for the five years from enactment to the effective date, pole owners collected rents according to the cable service rate formula. Therefore, the *FNPRM's* use of the cable

3. A Telecom Service Rate That is At or Lower than the Cable Service Rate Has Been Part of the FCC's Pole-Setting Jurisprudence for 14 Years

In practice the current telecom service rate formula usually yields rates considerably higher than the cable service rate due to the lower than anticipated number of authorized attachers on the pole. But this one-way direction was not intended or inevitable under the 1996 amendments. The FCC said as much at the time. In considering the five-year phase-in of the telecom service rate formula, the FCC pointed out that only rate *increases* resulting from the new formula were subject to phase-in. Where telecom service rates resulted in rates lower than the cable service rate, the FCC determined that "reductions are not subject to the phase-in and are to be implemented immediately."[40] Thus, even when the FCC initially established the telecom service rate, it was understood by the Commission, and incorporated into the pole attachment dispute rules, that rates lower than the cable service rate could result and that these reductions were to be immediately implemented. The *FNPRM*'s approach, which guarantees pole owners no less than the cable service rate, is consistent with establishing a rate that in some cases could in fact be higher than the rate produced by the telecom service rate formula. It is a result wholly consistent with the history of implementing Section 224(e).

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service rate – indeed, a return to the cable service rate -- as the likely upper bound of the Section 224(e) formula is in harmony with a substantial portion of the period that Section 224(e)(1) telecom service rate determinations have been in effect.

[40] 13 FCC Rcd. at 6835 ¶30. The *FNPRM* cites 47 C.F.R. § 1.1409(f), which codified this requirement in the event that the telecom rate formula leads to a reduced pole rate. *See FNPRM* at n.378 (also observing that telecom rate pole attachers paid the cable service rate prior to the effective date of the 1998 rules governing Section 224(e)). A telecom service rate lower than the cable rate could occur if there were a large number of attachers, thereby bringing down each user's share of pole costs.

4. The FCC's Approach of Denying "Double Recovery" for Incremental Capital Expenditures On Behalf of Telecom Rate Pole Attachers is Supported By Several Sections of the Pole Attachment Statute.

The *FNPRM* observes one practical justification for the proposed changes to the telecom service rate formula:

> As an initial matter, we note that if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the entire amount of those costs. It is likely that most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments.[41]

The *FNPRM* acknowledges what has long been contended by attaching parties: that the bulk of any capital costs associated with an additional attachment are entirely covered by the make-ready charges that the pole owner collects. The cost causer – the new attacher – has already paid for the costs caused by the attachment, namely the make-ready costs. Therefore, there is no legal requirement for the pole attachment formula to include capital costs, beyond what is required by Section 224(b)'s "just and reasonable" requirement (embodied in the cable service rate formula). The *FNPRM's* proposed approach avoids attributing to a telecom service attacher capital costs not required by the statute.

This approach, which deletes capital cost recovery in computing the low-end telecom rate, more accurately reflects the real relation of make-ready and cost causation. This policy of cost causation is one Congress enunciated in other parts of Section 224.

Section 224(i). For instance, Section 224(i) forbids a pole owner from charging existing attachers for make-ready required because of another attacher, including the

[41] *FNPRM* at ¶ 135.

pole owner, who needs to rearrange or replace a pole.[42] Congress explicitly barred a double recovery in this instance where the pole owner, for its purposes, rearranges or replaces a pole. Congress could have permitted the pole owner to charge all attachers in these instances. But the statute instead assigns those costs to the cost causer (the pole owner, in this hypothetical), and does not allow those costs to be laid off on other attachers who did not cause them.

The *FNPRM* captures the essence of what Congress legislated in Section 224(i). It similarly proposes a rate scheme that assigns capital costs for telecom service attachments based on cost causation. Any capital costs caused by an attacher are recovered in the make-ready process.

Section 224(g). Section 224(g) also affirms the *FNPRM*'s policy of assigning costs based on principles of cost causation. This provision requires that a pole owner that itself provides cable or telecom service impute a charge to itself as an attacher. It does not allow the owner to exclude its own attachments in computing what other attachers must pay.[43] Absent this provision a utility's attachment would essentially be a free rider on the pole. The utility would treat itself differently from all other attachers, who do not own the pole, pay for their occupancy, and have to include those costs in determining their prices to customers. This provision assigns costs, and requires their imputation by the pole owner, based on their cause.

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[42] 47 U.S.C. § 224(i): "An entity that obtains an attachment to a pole ... shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole . . . .)."

[43] *Id.*, § 224(g): "A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section."

Taken together these two provisions indicate that Congress intended in the attachment context to treat owner-attachers like any other attachers insofar as they cause costs to the operation or maintenance of each pole. The same approach underlies the rate reforms in the *FNPRM.* It identifies make-ready costs as the primary capital costs associated with unaffiliated attachers and reflects that fact in computing attachment rates.

B. The Proposal Fulfills Constitutional Requirements Under the Takings Clause.

As the proceeding discussion shows, the *FNPRM*'s revised determination of the telecom service rate – "calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher"[44] – fully compensates the pole owner under Section 224. And the proposal ensures that the owner receives compensation sufficient to avoid any a taking. This is because the pole owner would always be entitled, at a minimum, to the cable service rate.

As the *FNPRM* points out, that rate has been upheld as just, reasonable and fully compensatory by the U.S. Supreme Court. In 1987, in *FCC v. Florida Power Corp.*,[45] the Court found that the formula the Commission devised for pole attachments by cable television systems provides pole owners with adequate compensation, and thus did not result in an unconstitutional "taking."

Thus, the Commission's proposal raises no constitutional issues. Moreover, the result is fair for pole owners as it assures them of a fully compensatory rate.

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[44] *FNPRM* at ¶ 141.

[45] 480 U.S. 245 (1987); *See* also *Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, File No. PA 00-003, 16 FCC Rcd 12209 (2001).

IV. THE FCC SHOULD NOT INCREASE PENALTIES FOR "UNAUTHORIZED" ATTACHMENTS.

The Commission's *FNPRM* also seeks comment on whether it should adopt a more substantial penalty regime to deter "unauthorized attachments[46]." The answer is "no." The Commission should not adopt any additional penalty regime, including one modeled after the Oregon Public Utilities Commission's ("PUC's") rules, in the context of the attachment permitting processes. While Bright House agrees that adherence to proper permitting processes is important, the reality is that utilities' claims of widespread unauthorized attachments are unreliable and do not warrant adoption of a stiffer penalty regime. The Commission's existing fines and complaint procedures are adequate to address real issues of unauthorized attachments.

Bright House's experience is consistent with the views of other commenters in this proceeding that utilities' claims of rampant "unauthorized attachments" made by cable operators and other third-party attachers are exaggerated and cannot be accepted at face value. [47] Based on its recent experience with an investor-owned utility in Florida, utility claims of large numbers of "unauthorized attachments" result in any number of false positives. The case is instructive. In this instance, the audit that the utility's outside contractor performed was not actually designed to and did not, determine the number of attachments made without permits. And the audit was riddled with other errors, including the application (over Bright House's objection) of entirely new attachment counting methodologies to long existing plant.

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[46] FNPRM at ¶¶ 89-98.

[47] *See, e.g.*, Time Warner Cable Comments at 54-56; Time Warner Cable Reply Comments at 47-49; Knology Comments at 18; NCTA Reply Comments at 25.

Following an audit in 2008, this utility alleged that Bright House had made more than 23,709 unauthorized attachments to its poles since 2002. It demanded more than $4 million in back rent and interest for these allegedly "unauthorized attachments." During the course of subsequent litigation, however, it became clear the utility's claim was the product of a deeply flawed pole inspection scheme that was not designed to determine the number of Bright House attachments that were not properly permitted.

Before the utility's audit ever got underway, Bright House disputed the counting methodology that the utility instructed its contractor to use to count attachments, but to no avail. The utility disregarded Bright House's concerns about how the audit would be performed and proceeded using entirely new standards for counting attachments that, among other things, deviated from the standards contained in the parties' pole attachment agreements.

Importantly, the utility ignored the terms of a settlement agreement between the parties that resolved a dispute over an earlier pole count in 2001. That settlement specified precisely how Bright House's attachments would be counted in a future audit. However, the utility's auditors were not even informed of the terms of the parties' settlement agreement. They did not gather any information from the field that would enable them or the utility to count attachments as required under the terms of the settlement or determine whether a given attachment had been deemed authorized under the settlement. As a result, the utility counted again as "unauthorized" in 2008 more than 3,000 Bright House attachments that were expressly deemed *authorized* in the parties' 2001 settlement.

The utility also applied counting standards that were different from the standards that it used during the course of its 2001 audit. Specifically, while the utility in 2001 counted attachments that were more than one foot apart from each other as separate attachments, in 2008 it counted attachments that were more than 6 inches apart as separate attachments. As a result, attachments that were counted as one in 2001, were counted multiple times in 2008.

Also, for the first time in 2008, the utility counted empty spaces on a pole between attachments as separate attachments – that is, each foot of empty space between Bright House attachments was counted as an attachment itself. This new method led the utility to count seven times more poles with three or more Bright House attachments in 2008 than it counted in 2001. The result: Bright House was charged for 10,000 "empty space" "unauthorized attachments." The evidence established, however, that there are no circumstances under which it would make sense for Bright House to make more than 3 attachments to any given pole.

The utility's other new standards and errors further inflated the number of "unauthorized attachments" that it assigned to Bright House. Although it had never done so before, the utility counted double poles, extension arm brackets and cables three feet away from a pole all as separate attachments during its 2008 audit. These new presumptions resulted in approximately 3,000 "unauthorized" attachments. Another 4,000 "unauthorized" attachments charged to Bright House were entirely new poles that the utility had added into existing pole runs, which Bright House would not have had any notice of, filed permits to attach to, or even been billed for. The utility also counted as "unauthorized attachments" made by Bright House attachments that actually

belonged to other third-party attachers – including in areas where Bright House does not even operate.

To determine the number of Bright House's unauthorized attachments, the utility did not undertake any effort to reconcile the attachments counted in the field with the attachment permits that it had on file. Instead, the utility simply took the difference between the attachments that its contractor had counted and the number of attachments that it billed Bright House for in 2008. Because its process was not designed to determine whether any given attachment had actually been permitted, the utility could not provide Bright House any information on the location of the attachments that it claimed were "unauthorized" – in fact, the utility itself does not know the location of the attachments that it claimed are unauthorized. Consequently, Bright House could neither investigate nor contest the utility's claims on an individual pole-by-pole basis. And it later became evident that the utility's claim of more than 23,000 attachments was implausible: Bright House only constructed 200 miles of new plant in the utility's service area since 2002, which equates to roughly 7,000 new attachments, and Bright House had received 8,000 attachment permits since that time.

While the Commission observes that its existing penalties may not be severe enough to ensure compliance with permitting procedures, it needs to recognize that utilities sometimes attempt to impose penalties far beyond what the Commission has previously determined to be reasonable.[48] In the context of the audit discussed above, the utility had agreed that it would not charge Bright House for any unauthorized attachments until the parties agreed on the results of the audit. But before the parties

[48] *See FNPRM* at ¶ 94.

reached any agreement on the audit's results, the utility invoiced Bright House for more than $3 million in back rent and interest. The utility later sought more than $4 million in back rent and interest in court.[49]

The multi-million dollar penalty demanded from Bright House goes far beyond achieving any legitimate policy objective. Rather than encouraging compliance with permitting processes, such a massive penalty demand could produce a financial windfall that, if awarded, would create perverse incentives for the utility. Indeed, had Bright House actually made more than 23,000 unauthorized attachments – which it did not – a fine based on the Commission's existing rules would be much more than a "modest penalty" and would effectively deter non-compliance.

Ultimately, Bright House's recent experience with claims of unauthorized attachments in Florida shows a utility's propensity to exaggerate. Utilities have the incentive, and do, overstate the existence of unauthorized attachments. And they have a number of ways in which to build their erroneous claims. The Commission should not adopt a more severe penalty regime to fix the unauthorized review process. Given the fact-intensive (and often dubious) nature of such claims, the Commission in particular should eschew a uniform unauthorized attachment regime based on the Oregon PUC's rules. Instead, the Commission should continue to address claims through case-by-

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[49] Contrary to the FCC's rules, the utility derived this amount by charging Bright House for eight years of back rent on the 23,000 unauthorized attachments it claimed and adding compounded interest at the credit-card rate of 18 percent to that amount. *See* Mile Hi Cable Partners L.P. v. Public Serv. Co. of Colo., 15 FCC Rcd. 11,450, 11,458, ¶ 14 (Cable Serv. Bur. 2000) ("We believe that a reasonable penalty for unauthorized attachments will not exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest at a rate set for that period by the Internal Revenue Service ('IRS') for individual underpayments pursuant to Section 6621 of the Internal Revenue Code."), *aff'd on review*, 17 FCC Rcd. 6268 (2002), *review denied sub nom.* Public Serv. Co. of Colo. v. FCC, 328 F.3d 675 (D.C. Cir. 2003).

case adjudication using its existing rules. Those rules adequately ensure compliance with permitting processes with appropriate sanctions for violations.

CONCLUSION

As has been argued repeatedly by parties in this proceeding, there is no compelling policy reason to charge different attachers different rates. Congress in 1996 created two rate formulas for two specific sets of attachers – those attaching "solely to provide cable service" and attachments "used by telecommunications carriers to provide telecommunications services". It also established broad authority under Section 224(b)(1) to govern all rates and, in particular, to provide for attachment rates that do not fit those categories. And the FCC's exercise of authority to establish rates for commingled services that do not fall into the two categories was upheld by the Supreme Court authority in *Gulf Power.* That principle should be restated here

Congress did not mandate a higher rate for one set of attachers over another. And the FCC's 1996 implementation of Section 224(e) contemplated that the rates for telecom service attachments might indeed be lower.

The FCC'S implementation of the cable service rate formula has been upheld and followed by state pole rate authorities. It has led to fully compensatory payments to pole owners for pole use, and the make-ready process has ensured that additional capital costs are borne by those who cause additional fixed cost investments. The proposal in the *FNPRM* is fair to all parties, faithful to the actual wording of Section 224, and supportive of broadband innovation by attaching parties, who will benefit enormously by a more easily administrable set of implementing rate rules.

The Commission should reject utility claims that current procedures do not adequate deal with factual disputes regarding authorized attachments. To the extent there is a problem, Bright House's experience demonstrates that the fault lies with utility methods of detecting claimed violations.

Respectfully submitted,

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